No. 12,174

IN THE

United States Court of Appeals

For the Ninth Circuit

NAT YANISH, WILLIAM HEIKKILA, JOHN DIAZ, HERMAN LANSBURG and FRANK CARLSON,

Appellants,

vs.

I. F. WIXON, Individually, and as District Director, Immigration and Naturalization Service, Department of Justice,

Appellee.

BRIEF FOR APPELLANTS.

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Northern District of California, Southern Division, in a civil suit against the defendant individually and as an officer of the Immigration and Naturalization Service of the Department of Justice of the United States, seeking a review of the proceedings of that agency, a stay of agency proceedings during the pendency of such

judicial review, and temporary and permanent injunctions restraining the defendant from conducting deportation proceedings against the plaintiffs without compliance with certain requirements of the Administrative Procedure Act (5 USC sec. 1001 et seq.).

Jurisdiction of this Court is conferred by section 10 of the Administrative Procedure Act (5 USC sec. 1009), by 28 USC sec. 1331, and by the Fifth Amendment to the Constitution of the United States.

The jurisdiction of the District Court and of this Court are pleaded in paragraphs I, II, III and IV of the complaint, appearing on pages 2 and 3 of the transcript.

STATEMENT OF THE CASE.

Appellants in this case are aliens lawfully residing in the United States, whose deportation is sought by the Immigration and Naturalization Service of the Department of Justice (hereinafter called the Service). Warrants have been issued by the Service for the arrest of the appellants and these warrants have been served upon them by the defendant. Appellants are not in custody, but have been arrested and released upon bond.

Appellee I. F. Wixon was until May 1, 1949, the District Director of the Service for the 13th Immigration District of the United States, which includes the territory within the jurisdiction of the District Court and of this Court. He has since May 1, 1949,

been succeeded by Arthur J. Phelan, as Acting District Director, who will be substituted for Wixon as appellee.

Appellee Wixon by his agents and servants, in pursuit of his official duties, has at various times past caused appellants to be arrested, and has instituted deportation proceedings against them, with the exception of appellant Lansburg, whose arrest has occurred but in whose case no deportation hearings have as yet been held. With regard to this particular appellant, however, the appellee threatens to proceed in the same manner as against the other appellants. No special reference to his case will be made hereinafter but he will for the purpose of this brief be treated as though in exactly the same status as the other appellants.

The deportation proceedings against appellants were commenced early in 1948, and prior to May 7, 1948. The proceedings were conducted in the usual manner followed by the Service; as such they were not in conformity with the procedural provisions of the Administrative Procedure Act. (5 USC § 1001 et seq., hereinafter called the Act:) Section 5 of the Act (5 USC § 1004) provides in part that *"In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *"* the officer who makes the recommended decision or initial decision of the agency shall be the hearing officer, and that in the conduct of the hearing he shall (1) not consult with any person or party on any fact in issue except upon notice

and opportunity for all parties to participate; (2) that he shall not be responsible to or subject to the supervision or direction of any investigating or prosecuting officer of the agency; (3) that no investigating or prosecuting officer shall participate (except as witness or counsel in public hearings) in the decision or recommended decision of any case in which he has performed investigating or prosecuting functions. The defendant and the Service have in the past conducted, and threatened in the future to conduct, hearings in appellants' cases without compliance with these requirements.

Section 7 of the Act (5 USC § 1006) provides that the hearing officer presiding at all hearings required by statute, shall be qualified and appointed in conformance with the provisions of section 11 of the Act. (5 USC § 1010.) Section 11 requires that such hearing officers (1) be assigned to cases in rotation; (2) that they be civil servants qualified and competent to preside at such hearings; (3) shall have no duties inconsistent with their duties as hearing officers; and (4) shall be subject to removal for good cause by the Civil Service Commission alone and only on the record and after a hearing.

The appellee has in the past held and threatens in the future to hold hearings before an officer or agent of the service, subject to his direction, who is neither appointed, assigned nor qualified in this manner. On the contrary the hearing officer assigned to appellants' cases by appellee was specially designated for the cases of appellants, is not impartial, is not qualified

or appointed in conformance with the Act, and has duties inconsistent with those of hearing officer.

He is subject to removal by the agency without opportunity for notice and hearing, and in particular is subject to dismissal without good cause in that he may be dismissed pursuant to the provisions of Executive Order 9835 (12 F.R. 1935) if in the opinion of the Loyalty Review Board of the agency or of the Attorney General there is reason to believe that he is disloyal to the United States Government. The appellants are charged in the deportation proceedings with membership in organizations determined by the Attorney General, in accordance with the Executive Order cited, to be communist, fascist or subversive, and with personal advocacy of the overthrow of the government of the United States. The issue before such hearing officer is therefore one in which he is not free to make his own determination of the truth of the allegations regarding the organizations to which appellants are alleged to belong, without at the same time contradicting his ultimate superior, and subjecting himself to possible dismissal on the ground of disloyalty.

The hearings in appellants' cases were recessed *sine die* in May, 1948, after appellants' attorneys had made objection to proceeding without compliance with the Act and had on May 7, 1948, renewed that objection with particular reference to the decision of the District Court for the District of Columbia (Goldsborough, J.) in the case of *Eisler v. Clark,* 77 F.S. 610. They were set for further hearings in October, 1948,

after the decision of the District Court for the District of Columbia (Holtsoff, J.) in *Wong Yang Sung v. Clark,* 80 F.S. 235. The first of these decisions held that the Act did apply, and granted an injunction similar to that prayed for here; the second held that the Act did not apply, and denied a similar injunction.

Appellants thereupon brought this action. By stipulation in open court, it was agreed that no further administrative proceedings would be had in appellants' deportation cases until the determination of this case.

In the District Court three major issues were argued and determined. The first was whether the Attorney General is a necessary party in this case. This was determined in the negative, on the authority of *Williams v. Fanning,* 332 U. S. 490, 92 L. Ed. 161.

The second was that appellants had not exhausted their administrative remedies and that the Court should exercise its discretion by refusing to entertain this case. This was determined against the appellee, the Court holding that review at this point was, under all the circumstances, proper.

Third, whether the Act applied, insofar as its procedural requirements were concerned, to deportation proceedings. This was determined in the negative, on the ground that the exception in section 7 of the Act (5 U.S.C. § 1006) included deportation and other immigration hearings. The exception in section 7 states that *"Nothing in this Chapter shall be deemed to supersede the conduct of specified classes of pro-*

ceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute." The District Court here relied upon *Wong Yang Sung v. Clark, supra,* and other cases in accord.

The prayer for an injunction was denied, and on appellee's motion the complaint was dismissed. To these rulings appellants take exception and thereon prosecute this appeal.

The issues presented by this case are purely legal ones. With the exception of very brief testimony by the hearing officer assigned to hear the deportation cases of appellants, regarding his qualifications, the manner of his assignment to these cases, and his duties, no evidence was taken. Affidavits filed in support of the complaint were of course received, and appear in the transcript on appeal. No substantial conflict on the facts of the case developed.

The question thus presented is whether deportation proceedings fall within the exception to the operation of the Act, which is set forth in section 7 thereof. In the determination of this question it is necessary to inquire first whether deportation proceedings are within the provisions of section 5 of the Act, as adjudications *"required by statute to be determined on the record after opportunity for an agency hearing"*. If this is determined in the affirmative, then the procedural requirements of section 5, particularly of section 5 (c), referring to the qualifications of hearing officers, and of section 6 (5 U.S.C. § 1005), apply to deportation hearings unless excepted by section

7(a). Finally, there is the question whether deportation proceedings are such adjudications as were intended by the Congress to be excluded from the operation of the Act, under the exception in section 7(a).

SUMMARY OF ARGUMENT.

I. The Court below erred in refusing an injunction and dismissing the complaint, because the deportation statute as interpreted by the Courts requires an adjudication after hearing and upon the record.

The Courts of the United States have consistently and for many years construed the deportation statutes as requiring a fair hearing and a decision on the record. This construction has been found by the Courts to be essential to sustaining the deportation statutes against the charge of unconstitutionality.

II. The congressional intent was to include deportation hearings within the procedural requirements of Section 7 of the Administrative Procedure Act.

(1) Although the statute has been interpreted as requiring a hearing, there is no statutory designation of a hearing, nor of hearing officers.

(2) The designation of immigrant inspectors contained in 8 USC 152 does not constitute such a designation of officers as is contemplated by the Administrative Procedure Act.

(3) The congressional history of the Administrative Procedure Act demonstrates that it was the intent of Congress to include deportation hearings.

(4) The construction of the Act by the Attorney General prior to its passage by Congress and his actions following its passage demonstrate that it was the intent of Congress, as understood by the Attorney General, to include deportation hearings within the Administrative Procedure Act.

ARGUMENT.

I. THE COURT BELOW ERRED IN REFUSING AN INJUNCTION AND DISMISSING THE COMPLAINT, BECAUSE THE DEPORTATION STATUTE AS INTERPRETED BY THE COURTS REQUIRES AN ADJUDICATION AFTER HEARING AND UPON THE RECORD.

The Courts of the United States have consistently and for many years construed the deportation statutes as requiring a fair hearing and a decision on the record. This construction has been found by the Courts to be essential to sustaining the deportation statutes against the charge of unconstitutionality.

Section 5 of the Administrative Procedure Act (5 USCA § 1004) (hereinafter referred to as the Act) makes it obligatory upon administrative agencies of the Federal Government to observe certain procedural requirements *"in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing"*.

Although no question of the requirement of a hearing in deportation proceedings was raised by the appellee (defendant) below, the Service has heretofore taken the position that the Act does not apply because the statutes providing for deportation proceedings do not in terms require a hearing. See "The Federal Ad-

ministrative Procedure Act and the Immigration and Naturalization Service", an article by the late Commissioner, Ugo Carusi, in IV Immigration and Naturalization Service Monthly Review, 95, 103 (February 1947). In order to bring before the Court the relevant materials on this problem, a brief review of the cases in point is in order.

The uniform construction of the immigration statutes by the United States Supreme Court has been to the effect that although no hearing is required by the terms of the statute, the Constitution requires a hearing and the statute must be read as requiring a hearing in order to preserve it from unconstitutionality. Thus in the *Japanese Immigrant Cases,* 189 U.S. 186, 100, 101, the Court said:

> "But this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution * * * Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where

the principles involved in due process of law are recognized.

> "*This is the reasonable construction of the acts of Congress here in question* * * * In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." (Emphasis added.)

And in *Bridges v. Wixon,* 326 U.S. 135, 160, Mr. Justice Douglas remarked:

> "As construed and applied in this case, *the statute calls* for the deportation of Harry Bridges after *a fair hearing* * * *." (Emphasis added.)

Not only have the immigration statutes been construed as requiring a hearing, they have also been construed as requiring a determination on the record. In *Kwock Jan Fat v. White,* 253 U.S. 454, at 464, the Court said:

> "The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the Courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the execu-

> tive officers proceed to judgment. For failure to preserve such a record * * * the judgment in the case must be reversed."

This indeed was the construction put upon the immigration acts by Justice Goldsborough in the *Eisler v. Clark,* 77 F.S. 610. He said,

> "The courts have read due process into the Act, and due process means a hearing and * * * therefore a hearing is an integral part of the deportation act; in fact, just as much as if the Act itself in words stated that a hearing should be held."

To the same effect, see *U. S. ex rel. Trinler v. Carusi,* 166 F. 2d 457. The Court in that case pointed out that the fact that judicial review had been judge-made out of the concept of due process, did not make it any less a qualification of the statute than if it had been stated in the words of the statute. Obviously, opportunity for a hearing and opportunity for judicial review stand on the same footing in this regard. The Court held further that in the light of the decision of the Supreme Court in the *Japanese Immigrant Cases, supra,* it must be concluded that Congress was aware of the requirement of a fair hearing when it wrote the present immigration law. The requirement must, therefore, be regarded as included within the Congressional intent.

In short, due process requires, and the courts have consistently construed the immigration statutes to require, that no alien may be deported from the

United States without opportunity for a fair hearing and a decision based upon the record made in that hearing. So far as the relevant provision of section 5 of the Act is concerned, therefore, the Act applies.

II. THE CONGRESSIONAL INTENT WAS TO INCLUDE DEPORTATION HEARINGS WITHIN THE PROCEDURAL REQUIREMENTS OF SECTION 7 OF THE ADMINISTRATIVE PROCEDURE ACT.

(1) Although the statute has been interpreted as requiring a hearing, there is no statutory designation of a hearing, nor of hearing officers.

The section of the Act relied upon by appellees as designating officers for deportation hearings in such a manner as to bring deportation hearings within the exception in section 7(a) of the Act, is section 152 of Title 8, United States Code. That section does designate immigrant inspectors as the officers who are to make "the inspection, other than the physical and mental examination, of aliens, including those *seeking admission or readmission* to or the privilege of passing through or residing in the United States," with the exception of aliens excluded, who are to be examined by boards of special inquiry. The section contains other provisions empowering immigrant inspectors to take certain actions in connection with the examination of aliens seeking admission or readmission to the United States. That section, however, and every other section of the immigration laws may be examined most minutely without discovering anywhere

either any requirement of a hearing in deportation cases or any designation of immigrant inspectors for holding such hearings. *Naturally, where the statute does not provide for a hearing it can only by a tortured construction be said to designate officers to conduct a hearing.*

There is nothing inconsistent in the position of appellants here when they argue on the one hand that section 5 of the Act applies to deportation cases even though there is no clause or phrase in the deportation statutes which requires a hearing. It is well settled that statutes and all other statements of law have the force and effect ascribed to them by courts of competent jurisdiction, and no other effect. Since it has been determined that the statute requires a hearing in order to be constitutional, section 5 of the Act does apply to deportation hearings. But a judicial construction of the statute does not, and cannot, *add words to the statute.* In the absence of any words in the statute providing for a hearing and designating immigrant inspectors or other officers particularly named to hold hearings, the plain requirement of section 7 of the Act is not met.

That the designation of immigrant inspectors for the examination of aliens seeking admission does not constitute a designation of immigrant inspectors for all immigration and naturalization hearings is clear from the provisions of section 153 of Title 8, U. S. Code. That section provides for the appointment of boards of special inquiry who are to hold hearings

determining the right to enter the United States of applicants for admission. The section provides in part:

> *"Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards."*

This Court can take judicial notice of the fact that there are in the service of the Commissioner of Immigration and Naturalization immigrant officials who are not immigrant inspectors and under the plain terms of section 153, any of these officials would be available for appointment to a board of special inquiry.

The decision of the Second Circuit in the case of *Azzolini v. Watkins,* 172 F. (2d) 897, refers to section 152 of 8 U. S. Code as covering deportation as well as exclusion. Assuming that the authority cited for this proposition supports it, the decision in the *Azzolini* case still applies only to the power of inspectors to administer oaths, take evidence and have books and records produced for inspection. This is not the equivalent of a provision for a hearing and, as the decided cases cited in the preceding section of this brief demonstrate, the contention of the Immigration Service has been that no hearing is required or provided for by the deportation statutes. See in this connection the article of the late Commissioner Carusi in IV Immigration and Naturalization Service

Manual Review 95 (February 1947), cited *supra*. In that article the late Commissioner based his argument that the Act did not apply to immigation proceedings in part upon the fact that there was no express provision for hearings in the statutes.

Whatever courts may conclude about the intention of Congress with regard to whether the Act was merely a codification of existing law, or whether it extended and broadened the law, it cannot fairly be denied that the Congressional intent and the words of the exception in section 7(a) of the Act require for the exclusion of any proceedings from the operations of the Act, *a clear and unequivocal designation of officers for the purpose of conducting hearings.*

A decision that immigrant inspectors are officers designated by statute to conduct deportation hearings, so as to exclude deportation hearings from the operation of the Act, will naturally raise the question, "What statutory designation of hearing?" There is none.

(2) The designation of immigrant inspectors contained in 8 USC 152 does not constitute such a designation of officers as is contemplated by the Administrative Procedure Act.

The exception noted in the Act, in section 7 (5 USCA §1008) states that nothing in the Act shall be construed to apply to *"the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute"*. The opinion of Judge Holtzoff in *Wong Yang Sung v. Tom Clark, et al.,*

Civil Action No. 3420, D.C., Dist. Col., July 28, 1948, affirmed but not yet reported, finds in section 152 of Title 8, U.S. Code, such a statutory provision as brings deportation proceedings within the Act.

Section 152, however, applies only to exclusion proceedings. It is true that it confers authority upon immigration inspectors to examine aliens at ports of entry "touching the right of any alien to enter, reenter, pass through or reside in the United States * * *". The opinion relied upon the term "reside in" in the quoted passage. It is perfectly clear, however, from the provisions of the immigration laws generally, that persons may *seek admission* to the United States for the purpose of residing therein. There is nothing whatever inconsistent in providing that such aliens may be examined with regard to their right to reside in the United States, in a section which is concerned with examination for purposes of *exclusion* and which has nothing whatever to do with *deportation*.

The differences between exclusion and deportation are clear. The alien who is only knocking at the door is a man with very few rights under the laws of the United States. The alien who is already lawfully resident here, as are the plaintiffs herein, has acquired a host of rights, privileges and immunities which are not possessed by one subject to exclusion. He may become a citizen. He may not be deported except for certain enumerated reasons and except after arrest upon a warrant setting forth the charges against him, and an administrative trial on the merits. One

who is subject to exclusion may, under Public Law 552, 80th Congress, and 8 CFR 150.57, be excluded if, in the opinion of the Attorney General, his admission would be prejudicial to the United States. And if the Attorney General relies upon confidential information, the alien may be excluded without a hearing. An alien legally resident in the United States is not deportable on the ground that he is mentally ill or has become a public charge. An alien seeking admission may be excluded on the ground that he is mentally ill or that he is likely to become a public charge. The list could be extended to considerable proportions. The difference between exclusion and deportation must in the last analysis depend upon the fact that when one becomes a resident of the United States he becomes entitled to the protection of its laws, except such as are reserved for citizens only. But when one is an alien who has not been admitted to the United States, he can seek grace alone, and while he has certain privileges, they are enforced on his behalf in the interest of preserving our scheme of government by laws, not men, and not because the alien is guarded and protected for his own sake.

The distinction is therefore of the utmost importance. A statute which designates officers for hearing exclusion cases is a far cry from a statute which designates officers for hearing deportation cases.

Even assuming that Judge Holtzoff's opinion is correct, and deportation hearings are "*specified classes*

*of proceedings * * * specially provided for by or designated pursuant to statute",* this ruling would mean not that the Act as a whole does not apply to deportation proceedings, but only that a portion of section 7(a) does not apply. That portion of section 7(a) which requires that hearings be presided over by examiners appointed pursuant to section 11 would, if Judge Holtzoff is correct, not apply to deportation cases. But the provisions of section 5, that the hearing officers used must not be directed by investigative and prosecuting officials, nor prosecute and investigate in allied cases, and the provisions of section 11 requiring that hearing officers must be assigned in rotation, would still apply to deportation cases.

The defendant contends that these sections also have no application to him and his officers and admits that they do not intend to comply with them in the threatened hearings. That this is the construction which Judge Holtzoff placed upon his own decision is clear from the conclusions of law which he entered. These read:

> "1. That Section 7(a) of the Administrative Procedure Act, (60 Stat. 243, Title 5 U.S.C., Section 1001), is not applicable to hearings held by the Immigration and Naturalization Service of the United States Department of Jusitce.
>
> "2. That the petitioner is not unlawfully detained.
>
> "3. That the petitioner is not entitled to be released from the custody of the respondents."

Indeed, Judge Holtzoff in a prior and elaborate opinion in *U. S. ex rel. Lindenau v. Watkins,* 73 F. Supp. 216, held that deportation proceedings are subject to judicial review under §10 of the Act. The Court in that case was concerned with changes made by the Act in the scope of judicial review of deportation orders, and in the quantum of evidence necessary to support such orders, upon petition for habeas corpus. Judge Holtzoff discussed the provisions of §10, which he held to be the governing law, reviewing the congressional history of the Act, and concluding that it is now necessary for the courts to inquire into the substantiality of the evidence upon which the deportation hearing was based, and that the Act requires that such orders must be supported by "substantial evidence."

Returning to the exception in section 7(a), it may be asked whether immigration inspectors are "designated pursuant to statute" to bring them within the exception to the Act. Their designation in deportation cases is made pursuant to orders or regulations promulgated by the Attorney General and the Commissioner of Immigration, not by nor pursuant to statute. If such loose and inferential statutory authority for their appointment is sufficient to bring the case within the exception, then the Act would have no application to any regularly constituted and functioning administrative agency. All administrative agencies find some sanction and support in statutory authority for their existence and for the appointment of particular em-

ployees to particular tasks. Unless this is so, the acts of such employees are without any authority whatever.

If the exception in section 7(a) is to be construed as applying to every hearing officer or board for whose appointment some authority may be found, however inferential and however far removed, in some statute of the United States, then the purpose of the Act will be completely frustrated.

(3) The congressional history of the Administrative Procedure Act demonstrates that it was the intent of Congress to include deportation hearings.

The exception in § 7(a) was discussed by the Congress, as appears from the committee reports of both the House and the Senate. See Senate Committee Report, pp. 207, 216; House Committee Report, p. 268; and Senate Proceedings, p. 325. A typical excerpt is that of the House Committee Report, which, in commenting on this section, noted that (p. 268):

> "The preservation of the 'conduct of specified classes of proceedings by or before boards or other officers specially provided by or designated pursuant to statute' is not a loophole for the avoidance of the examiner system; it is intended to preserve only special types of statutory hearing officers who contribute some special qualifications, as distinguished from examiners otherwise provided in the bill, and at the same time assure the parties fair and impartial procedure." [Senate Document No. 248, 79th Cong., 2nd Session.]

The debate in both the House and the Senate emphasized the same view. Thus in the Senate, Senator

Pat McCarran, sponsor of the bill, reporting to the Senate on the provisions of the bill, remarked as follows:

> "The committee has considered the possibility that the preservation in section 7(a) of the 'conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute' might prove to be a loophole for avoidance of the examiner system. If experience should prove this true in any real sense, corrective legislation would be or might be necessary. Therefore, the committee desires that Government agencies should be put on notice that the provision in question is not intended to permit agencies to avoid the use of examiners, but only to preserve special statutory types of hearing officers who contribute something more than examiners could contribute, and at the same time to assure the parties fair and impartial procedure." [P. 325, Senate Document No. 248, supra.]

In the House, Mr. Walter, chairman of the House sub-committee which carefully considered the bill, discussed the provision as follows:

> "This provision authorizes agencies, if they do not wish to hear cases themselves, to delegate the hearing function to the named types of presiding officers. It does not mean, however, that agencies are authorized—whether pursuant to the express authority of other statutes or not—to avoid the examiner system—set up in this bill and hereafter discussed—by assigning general employees or attorneys to hear cases individually or as boards.

> In short, unless the agency or its members or some specially qualified statutory officer hears the case, an examiner qualified under section 11 of this bill must do so." [P. 364, Senate Document No. 248, supra.]

Another indication of the legislative intent is found at page 1456 of "Hearings Before a Sub-Committee of the Senate Committee on the Judiciary on S.674, S.675, and S.918, 77th Congress, First Session (1941)". It there appears that the provisions of §301 of S.675, 77th Congress, First Session, one of the precursors of the bill which finally became the Act, made the provisions of the bill apply to cases where "rights, duties, or other legal relations are required *by law* to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing". [Emphasis added.] The then Attorney General, Biddle, suggested to the committee in hearings that "by law" was too broad and that "by statute or Constitution" should be substituted therefor. He said:

> "In some cases said agencies have ex gratia by regulations imposed upon themselves requirements of formal procedure though the applicable statute makes no such requirement. In order to exclude the possibility that such procedures come within Title III, the amendment is desirable".

And in the Senate Judiciary Committee print of the bill, which later became the Act, the following statement regarding the "required by statute" phrase appeared:

> "Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing." [Legislative History, p. 22.]

These items of legislative history demonstrate that the intent of Congress was not to require conformity with the Act in cases where the administrative action was not of such a nature that the agency was compelled by law to give a hearing even though the agency might decide to give a hearing of some sort. Deportation cases are not such cases as has been demonstrated above. The statutes, as construed by the courts and as required by the Constitution, make a hearing mandatory in deportation cases.

(4) The construction of the Act by the Attorney General prior to its passage by Congress and his actions following its passage demonstrate that it was the intent of Congress as understood by the Attorney General, to include deportation hearings within the Administrative Procedure Act.

In 1945, the Attorney General made an analysis of the proposed bill, which then contained the exception hereunder discussion, in precisely the same form. The Attorney General's report stated:

> "Section 7. This section applies in those cases of statutory hearing which are required by sections 4 and 5 to be conducted pursuant to section 7. Subject to the numerous exceptions contained

in sections 4 and 5, they are cases in which an order or rule is to be made upon the basis of the record in a statutory hearing.

"Section 7(a). The subsection is not intended to disturb presently existing statutory provisions which explicitly provide for certain types of hearing officers. Among such are (1) joint hearings before officers of the Federal agencies and persons designated by one or more States, (2) where officers of more than one agency sit, (3) quota allotment cases under the Agricultural Adjustment Act of 1938, (4) marine casualty investigation boards, (5) registers of the General Land Office, (6) special boards set up to review the rights of disconnected servicemen (38 U.S.C. 693h) and the rights of veterans to special unemployment compensation (38 U.S.C. 696h), and (7) boards of employees authorized under the Interstate Commerce Act (49 U.S.C. 17 (2))."

An examination of the agencies referred to by the Attorney General reveals that some of them are no longer in existence. Considering the quota allotment cases under the Agricultural Adjustment Act of 1938, however, the provisions are now substantially the same as they were at the time this analysis was made. The Agricultural Adjustment Act, which appears in Title 7, Chapter 35, of the United States Code, sets up a procedure for establishing farm marketing quotas for farmers of the particular crops covered by the Act. Section 1363 of Title 7 provides that any farmer who is dissatisfied with his quota may have the quota reviewed "by a local review committee composed of

three farmers appointed by the Secretary". The use of farmers as a portion of the legislative scheme here is resorted to in other sections of the Act. Farmers are used to form committees to set up quotas for areas, and to pass upon other problems of quota setting. Section 1363 carefully provides that the three farmers who shall review such a quota shall not include any member of the local committee which determined "the farm acreage allotment, normal yield, or the farm marketing quota for such farm."

The statutory provisions for setting up these committees of local farmers are found in section 1388 of Title 7, referring to sections 590h(b) and section 590k of Title 16, and also to sections 590g to 590i, 590j to 590q of Title 16. It is apparent from this precise statutory delineation that the groups who are to pass upon the questions arising in effectuating the purposes of the Act are to be men *familiar with local conditions,* and men *skilled in farming.* Thus 590h(b) of Title 16 provides in part:

> "In determining the amount of any payment or grant measured by (1) or (2) the Secretary shall take into consideration the productivity of the land affected by the farming practices adopted during the year with respect to which such payment is made. In carrying out the provisions of this section in the continental United States, the Secretary is directed to utilize the services of local and State committees selected as hereinafter provided. The Secretary shall designate local administrative areas as units for administration of programs under this section. No such local area shall include more than one county or parts of

different counties. Farmers within any such local administrative area, and participating or cooperating in programs administered within such area, shall elect annually *from among their number* a local committee of not more than three members for such area and shall also elect annually *from among their number* a delegate to a county convention for the election of a county committee. The delegates from the various local areas in the county shall, in a county convention, elect, annually, the county committee for the county which shall consist of three members *who are farmers in the county.* The local committee shall select a secretary and may utilize the county agricultural extension agent for such purpose. The county committee shall select a secretary who may be the county agricultural extension agent. If such county agricultural extension agent shall not have been elected secretary of such committee, he shall be ex officio a member of the county committee. The county agricultural extension agent shall not have the power to vote. In any county in which there is only one local committee the local committee shall also be the county committee. In each State there shall be a State committee for the State composed of not less than three or more than five *farmers* who are legal residents of the State and who are appointed by the Secretary. The State director of the Agricultural Extension Service shall be ex officio a member of such State committee. The ex officio members of the county and State committees shall be in addition to the number of members of such committees hereinbefore specified. The Secretary shall make such regulations as are necessary relating to the selection and exercise of the func-

tions of the respective committees, and to the administration, through such committees, of such programs * * *." [Emphasis added.]

The careful statutory designation of the committees who are to perform certain specified acts, and the close relation between the personnel of the committees and the special skill and knowledge required to perform the committee functions, should be noted here.

The Attorney General refers also to marine casualty investigation boards. The provisions of Title 46 of U.S. Code, upon which the Attorney General's report was based, have since been changed. The functions which in 1945 were performed by marine casualty boards are now performed by the United States Coast Guard. As the provision stood in 1945, however, there was a statutory scheme involving investigation of marine casualties by local inspectors, employees of the Bureau of Marine Inspection and Navigation. Section 384 of Title 46 provided for the qualifications and appointment of local inspectors. The section stated:

"§384. *Qualifications and appointment of local inspectors.* The inspector of hulls shall be a person of good character and suitable qualifications and attainments to perform the services required of an inspector of hulls, *who from his practical knowledge* of shipbuilding and navigation and the uses of steam in navigation *is fully competent* to make a reliable estimate of the strength, seaworthiness, and other qualities of the hulls of vessels and their equipment deemed essential to safety of life in their navigation; and the inspector of boilers shall be a person of good character

and *suitable qualifications and attainments* to perform the services required of an inspector of boilers, who *from his knowledge and experience* of the duties of an engineer employed in navigating vessels by steam, and also of the construction and use of boilers, and machinery and appurtenances therewith connected, is able to form a reliable opinion of the strength, form, workmanship, and suitableness of boilers and machinery to be employed, without hazard to life from imperfection in the material, workmanship, or arrangement of any part of such apparatus for steaming. The inspector of hulls and the inspector of boilers designated by the Secretary of Commerce shall, from the date of designation, constitute a board of local inspectors." [Emphasis added.]

Section 239 of the same Title provided for investigation of misconduct of officers in cases of marine disasters.

The "registers of the General Land Office", to which reference is made in the Attorney General's report, no longer exist. In Title 43 of the United States Code, however, Chapter 4 set up a legislative scheme in which there was provision for a federal officer, designated a "Register". This officer was charged with the duties of the sale of public lands and Indian lands. (Section 72 of Title 43.) He was by section 75 of the Title authorized to administer oaths. His precise duties did not clearly appear in the statute, but section 82, setting forth the fees and commissions which the register was allowed, gives some idea of the nature of his activities. It appears from

this section that he was required to accept homestead claims; to locate lands under Congressional grants for railroad and other purposes; to issue patents for mineral lands; to take testimony and certify records regarding claims to desert lands and homesteads. Section 87 provides that Registers shall upon application furnish plats or diagrams showing vacant lands and the lands that have been sold. In general, the Register appears to have been a public official of considerable importance during the period when there were vast areas of the public domain for sale or grant to individuals and corporations, when the Government was encouraging settlement of the West. This official was entrusted with a great deal of discretionary power and entitled to receive fees which would be used as his compensation. But he did not ordinarily sit as a hearing officer.

The Attorney General's report discusses the special boards set up to review the rights of disconnected servicemen in 38 U.S. Code §693h. As that section now stands, it provides for the establishment in the Army and Navy Departments of boards of review composed of five members each, whose duties are to review the type and nature of discharge and dismissal of ex-servicemen. The Act provides in part:

> "Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such persons. Witnesses shall be permitted to present testimony either in person or by affidavit and the person re-

> questing review shall be allowed to appear before such board in person or by counsel * * * Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are amended to authorize the Secretary of the Army and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the Army or the Secretary of the Navy, respectively * * *."

Assuming that the provisions to which the Attorney General had reference were somewhat similar to these, it is to be noted that these boards of review were a portion of the military and naval establishments, and were specifically delegated to review the *military function* of discharging men from the services and to perform the *military function* of providing new and different discharges.

Finally, the Attorney General refers to the provisions of 49 U.S. Code § 17(a), relating to boards of employees authorized under the Interstate Commerce Act. Section 17(a) of the Title provides that:

> "The Commission may by order direct that any of its work, business, or functions under any provision of law (except matters required to be referred to joint boards by section 305, and except functions vested in the Commission under this section), or any matter which shall have been or

> may be referred to it by Congress or by either branch thereof, be assigned or referred to any division, to an individual Commissioner, or to a board to be composed of three or more eligible employees of the Commission (hereinafter in this section called a 'board') to be designated by such order, for action thereon, and the Commission may by order at any time amend, modify, supplement, or rescind any such assignment or reference. The following classes of employees shall be eligible for designation by the Commission to serve on such boards: examiners, directors or assistant directors of bureaus, chiefs of sections, and attorneys. *The assignment or reference, to divisions, of work, business, or functions relating to the lawfulness of rates, fares, or charges shall be made according to the character of regulation to be exercised and not according to the kind or class of the carriers involved or to the form or mode of transportation in which such carriers may be engaged* * * *." [Emphasis added.]

The italicized portion above discloses that the employees who were to be assigned to particular tasks within the Commission were to be assigned in accordance with their particular knowledge and skill of the problems of rate making.

It may be seen that both the House Committee report and the Attorney General's analysis agree that one of the important classes of agencies to which the Act does not apply are those in which some particular skill or qualification is brought to the hearing by the statutory hearing officer. It has been suggested that the immigrant inspector is a person possessed of a

particular skill and knowledge not available outside the Service. Examination of section 155, the principal statute governing deportation proceedings, however, fails to support this suggestion. The question which is before the presiding inspector at a deportation hearing is of the sort generally heard before courts without any special qualifications or particular knowledge other than knowledge of the law. Below are listed seriatim the issues which may be before such a presiding inspector under the provisions of section 155:

(1) Whether within five years after entry an alien was at the time of entry a member of one or more classes excluded by law.

(2) Whether the entry of the alien was in violation of Chapter 6 of Title 8 of the United States Code or any other law of the United States.

(3) Whether the alien remains in the United States in violation of Chapter 6, or any other law of the United States.

(4) Whether the alien at any time after entry has been found advocating or teaching the unlawful destruction of property, anarchy, overthrow of the Government of the United States by force or violence, overthrow of all forms of law, or the assassination of public officials.

(5) Whether the alien has within five years after entry become a public charge from causes not affirmatively shown to have arisen subsequent to landing.

(6) Whether the alien has been sentenced to imprisonment for a term of one year or more because of conviction in this Country of a crime involving moral turpitude, committed within five years after his entry into the United States, or whether he has been more than once sentenced to such a term.

(7) Whether the alien is an inmate of or connected with the management of a house of prostitution, or practicing prostitution, or receiving, sharing in, or deriving benefits from any part of the earnings of any prostitute.

(8) Whether the alien manages or is employed by any or in connection with any house of prostitution or music or dance hall or resort habitually frequented by prostitutes, or whether he in any way assists or protects or promises to protect from arrest any prostitute; whether the alien has imported or attempted to import any person for purposes of prostitution or other immoral purpose.

(9) Whether the alien has been excluded and deported or arrested and deported as a prostitute or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes, and has returned and entered the United States.

(10) Whether the alien has been convicted and imprisoned for a violation of the provisions of section 138 of 8 U.S. Code.

(11) Whether the alien was convicted or admits the commission prior to entry of a felony or other crime involving moral turpitude.

(12) Whether at any time within three years after entry the alien entered the United States by water at any time or place other than that designated by immigration officials, or by land at any place other than one designated as a port of entry; or whether the alien entered without inspection.

(13) Whether a female alien has married an American citizen and is a member of the "sexually immoral classes."

(14) Whether an alien convicted of a crime involving moral turpitude has been pardoned or whether the judge who sentenced such alien for such crime did at the time of imposing judgment or passing sentence or within 30 days thereafter, after giving due notice to representatives of the state, make a recommendation to the Attorney General that such alien be not deported in pursuance of Chapter 6 of Title 8.

It is perfectly true that immigration law and regulations constitute a morass in which the lawyer not a specialist in the field may well become bogged down. It is true that immigrant inspectors and persons conducting hearings under the Act or otherwise could profitably be required to be familiar with this body of law and regulations. This is no more, however, than

may be said of a specialist in any of the recognized subdivisions of law. No special *skill* is required by a supervising inspector in a deportation case, but only a knowledge of the law.

Agreeing that a knowledge of immigration law and regulations might be a proper prerequisite for the appointment of a hearing inspector, this is by no means inconsistent with the spirit or the language of the Act. Section 11 of the Act (5 USCA §1010) provides for the appointment of "qualified and competent examiners"; and section 12 of the Act (5 USCA §1011), further provides "every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise." The appointment of qualified examiners, acquainted with the law and the regulations, and their assignment in rotation in accordance with the provisions of the Act, is neither difficult nor prejudicial to the Government. Even if it were difficult, expensive, and from the point of view of the Government prejudicial, to provide for such hearing officers, if the alien is entitled to have them appointed, no argument based upon mere expediency can avail the Department. We are here concerned with Constitutional rights.

The legislative history of the Act makes it clear that Congress intended to exempt from the procedural provisions of the Act hearing officers who, by the nature of the adjudications they are required to make, must possess a particular skill or knowledge not available in persons without specialized training and experience. The Attorney General's analysis indicates that

in his view certain other exceptions were intended. These may be stated briefly as follows:

(1) Cases in which the agency employees occupy a particular position of power or authority, as in joint hearings before officers of Federal agencies and persons designated by one or more States. In such hearings the designated persons represent state and national sovereigns, and to a degree exercise the sovereign power of the United States and of their respective States. This would be true also where officers of more than one agency sit, exercising the authority of the particular agencies.

(2) Cases in which the hearing officer exercises a particular type of function which by law and practice has for a long period been excluded from the province of civil agencies, including civil courts. An example of this is the special boards set up to review the rights of disconnected servicemen. Here the hearing officers are empowered to perform the military functions of changing sentences passed upon servicemen during their period of military service, revoking military discharges and issuing new and different ones.

(3) Where the function to be exercised is one requiring a particular skill or knowledge. This is the exception discussed above. It is referred to by the Attorney General when he mentions marine casualty investigation boards, and quota allotment cases under the Agricultural Adjustment Act.

(4) Cases where the statutory designation is precise and clear, and the purpose for which such desig-

nation is made is one not inconsistent with the policy underlying the Act. An example of this is the Register of the General Land Office. This official, as he formerly existed, was an official designated in clear and precise terms by statute to perform functions which had little of the quasi-judicial nature which ordinarily characterizes administrative hearings. In the execution of his duties, he was unconcerned with adversary proceedings, and his orders and decisions were on matters requiring merely an interpretation of Government records, the same general sort of function as performed by county recorders in many States. The policy of the Act is to set forth the best procedure in cases where administrative agencies conduct adversary proceedings of a quasi-judicial nature. The Register of the General Land Office was clearly outside this policy.

As noted in the House Report, this bill is a result of about 10 years of study, during the course of which the Attorney General's Committee was set up to make an exhaustive survey of Federal agencies with a view to drafting just such an act as this one. The agencies studied included the Immigration and Naturalization Service of the Department of Justice. (P. 245, Legislative History).

The defendant here staunchly maintains that the Act does not apply to the Immigration Service. This is, of course, the position taken by the Attorney General in the *Eisler* case, *supra,* and in the *Trinler* case, *supra.* It is puzzling, therefore, to find that the Attorney General and the Service have for some time re-

garded the Act as applying and have been fulfilling its terms at least so far as section 2 (5 USCA §1002), is concerned. The Attorney General has been publishing in the Federal Register notice of proposed rule making in immigration and naturalization matters. (See for example, 13 Fed. Reg. 780, Feb. 20, 1948; also 13 Fed. Reg. 5494).

The Attorney General has also been complying with the provisions of the same section requiring publication of the administrative organization of the Service. (See 13 Fed. Reg. 1891, April 7, 1948, and also 13 Fed. Reg. 1991. April 14, 1948).

Nor is this the only indication that the Attorney General regards the Act as applicable to the Service. It is reported in "Interpreter Releases", an information service on immigration, naturalization, and the foreign born, published by the Common Council for American Unity, 20 West 40th Street, New York, N. Y., in Vol. XXV, No. 29, page 182, that:

> "By request of the Administration, Mr. Fellows on May 24 introduced in the House a bill, H.R. 6652, which would except the immigration and nationality laws from most provisions of the Administrative Procedure Act of 1946. Mr. Revercomb, on May 26, introduced in the Senate an identical bill, S. 2755."

These bills had not been acted upon by the Congress up to the end of the session. See *ibid,* Vol. XXV, No. 37, pp. 248, 250. (Information on the introduction and subsequent history of these bills is available through the Interpreter Releases, and no other cita-

tion is given here because no reference to them is made in the Congressional Service). Thus, the Attorney General, whose orders bind the defendant, has on the one hand argued that the Act does not apply to the Service, and on the other has admitted its application by complying with it, and by seeking Congressional immunity from it.

CONCLUSION.

For ten years before the passage of the Administrative Procedure Act, the Attorney General and numerous congressmen were engaged in a thorough study of the problems presented by the sudden growth of administrative agencies in our Government. In the Act, the Congress codified what was believed to be the best, that is to say the fairest and most effective procedure, in cases of rule making, adjudication, and other administrative activities. Since the passage of the Act, its application to existing agencies has been resisted by the agencies. Not least among those who insist that this fairest and best procedure is not required of it, is the Immigration and Naturalization Service.

The arguments heretofore advanced by the Service to prove that the Act does not apply, have nothing whatever to do with the considerations that moved the Congress to enact this statute. That is to say, no attempt is made by the Service to show that it would be impossible, unnecessary, unwise, or prejudicial to the interests of the United States, if the Service were

required to meet the same standards of fairness as other agencies. The argument advanced depends almost entirely upon the ambiguity of certain sections of the Act. This in turn throws open the doors to inquiry into the intention of Congress in passing the Act.

Congress, in passing this Act, as in all controversial matters, can only by a fiction be said to have had any unified and common intention. Some of the Congressmen and Senators undoubtedly intended to require a uniform standard of fairness of all regular administrative agencies, and others doubtless intended something less than that. But in construing the Act, the Court must ascribe to Congress an intention both constitutional and reasonable. In the absence of any showing that it is unreasonable to require the Immigration Service to meet the standards of fairness required of other agencies, and in the absence of any showing that the Immigration Service by its present procedure satisfies the policy of the Act, there is nothing to move the Court to construe the Act as embodying a congressional intent to unreasonably exclude from the operation of the Act the Immigration and Naturalization Service. Such a construction of the Act, depending as it does upon a purely technical argument without regard for the broad policies which moved the proponents of the Act to fight for its passage over ten long years, would frustrate the purpose of the Act. It would be a conquest of the letter over the spirit, and the lawyers over the law.

Appellants respectfully submit that they are entitled to the same fair administrative procedure before the Immigration and Naturalization Service as they would receive before any other administrative agency of this Government. Such fair procedure can be obtained only if the Service is held to be bound by the provisions of the Administrative Procedure Act.

Dated, San Francisco, California,
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Respectfully submitted,
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